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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-711

WESTERN AIRLINES, INC., *Petitioner*,

v.

CONTINENTAL AIR LINES, INC., *Respondent*.

REPLY BRIEF FOR PETITIONER WESTERN AIRLINES, INC.

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Western Airlines, Inc. (Western), Petitioner in this cause submits this brief in reply to the Brief filed by Respondent, Continental Air Lines, Inc. (Continental) on December 5, 1975.

Western regrets that this brief was not filed earlier. Continental's brief was due on December 15, 1975. Continental chose to file on December 5, but did not serve a copy on Counsel for Western. Counsel in Washington was not aware of filing until he inquired of counsel for Continental on December 18. Counsel for Western in Los Angeles did not receive a copy of Continental's

brief until December 29. Communications and mailing problems between Washington and Los Angeles during the Christmas season together with late service have delayed the filing of the reply brief until now.

A. Continental's Restatement of the Case

The statement of the case is set out clearly and concisely at pages 3-7 of Western's Petition. Continental's restatement of the case appears at pp. 3-8 of its brief. Much of the difference between the two statements is attributable to the advocate's prerogative to state the case in the way most favorable to his cause. But additional comment is necessary on at least one misleading aspect of Continental's statement.

On page 3 of its brief Continental states that the C.A.B. certificated competitive nonstop service in all of the markets at issue in this case except San Diego-Denver. While the statement is technically correct, it leaves the false impression that the Board awarded no new authority in the San Diego-Denver market.

As pointed out on page 3 of the petition, the Board awarded "new nonstop authority in each of the markets at issue, by removing operating restrictions from carriers which already held authority to serve them." In the San Diego to Chicago, Washington and New York markets there was existing nonstop authority so the new award was second nonstop authority to another carrier. In the San Diego-Denver market no carrier held nonstop authority at the time. However, the award of first nonstop authority to Western resulted in very significant service improvements.

Thus, this case has already produced substantial service benefits for the public, regardless of the disposition afforded the part which is now at issue before this court.

B. The Time Required To Decide This Case

In its restatement and at other places in its brief Continental makes much of the time which has elapsed since the first phase of this case began. It implies that this is another example of the stereotyped administrative lag—a case in which administrative lethargy or nonfeasance has unnecessarily delayed action which is required in the public interest. Continental claims that the length of time involved justifies the extraordinary control which the lower court is trying to exercise over the remanded proceedings before the C.A.B. (Continental Br. pp. 8, 13, 15, 22).

Continental's position is not valid. This is not an instance of administrative lag of inaction. To the contrary, since this case was instituted the Board has held two full hearings in it. As pointed out above and in the petition, the first hearing and decision resulted in substantial new service in San Diego markets, including San Diego-Denver.

After the first hearing the Board found that it would not be in the public interest to award competitive nonstop authority in the San Diego-Denver market. The case had been decided.

However, alleged new facts brought out for the first time in petitions for reconsideration, particularly by Continental, caused the Board to reconsider the need for competitive authority in the San Diego-Denver market. A computational error in a subsequent order on reconsideration (See Petition p. 4) resulted in a reopening of the proceeding. The parties were plunged into another full hearing.

This, of course, was to the advantage of Continental and the other applicants for competitive authority,

whose applications had been denied, during the first phase of the case. It kept their hopes alive. But, it was a decided disadvantage to Western, the incumbent carrier on the route. Even though the Board had already found that Western's service was adequate to meet the needs of the market, Western was again plunged into an expensive, time-consuming hearing, primarily because the Board was uncomfortable with the legal posture of the case after discovery of the computational error in its order on reconsideration.

After completing its second full hearing in a four year period the Board again decided by majority vote that competitive service was not required between San Diego and Denver (Order 72-12-29, Appendix, p. 37a).

Again Continental kept its hopes alive by petitioning for reconsideration, and, after denial of its petition by the Board (Order 74-5-17, Appendix 37a), by seeking judicial review.

Thus, Continental's repeated references to the time required to process this case have a hollow ring. Continental cannot claim prejudice because it has been basically responsible for the delay. On the other hand, Western has been seriously prejudiced by having to go through a second hearing and court appeal on a matter which we consider was properly decided by the Board in 1970.

The harm to Western will be compounded if, after all of this, the court below is allowed to dictate to the Board that competition is required, on the route at issue, and that Continental should be selected.

We think that the Board's final decision that competitive authority is not required is legally sufficient

and should be upheld by the Court. But, if it is not, and if the case should be remanded for further action, the Board must at least have the flexibility to take into account significant changes in circumstances, which have occurred since the base year used for traffic forecasting by the Board in this case—the year ended June 30, 1971. We pointed out some of these basic changes in our Petition, pp. 24-26, and Continental has not denied them in its brief.

C. The Lower Court's Encroachment Upon the Board Functions

Continental argues (Br. pp. 13-18) that the Court below has not restricted the Board's freedom on remand. It says that the "Board was left free either to adopt or reject the decision of the Administrative Law Judge selecting Continental" (Br. p. 14); that the Board is "free to take additional evidence if it first identifies to the court the issues it wishes to explore in a further hearing" (Br. p. 16) and that there is "no indication that the court will not permit it to [take additional evidence]" (Br. pp. 16-17).

Continental's interpretations of the Court's mandate are the product of enlightened self-interest, and will not withstand even a cursory reading of the lower court's opinion.

The court found that the Board's failure to authorize competitive nonstop service between San Diego and Denver "is not in accord with the public interest considerations set forth in § 102 of the Act" (Appendix, 4a); and that "[t]he record before us contains ample evidence of the need for competing nonstop service" (Appendix, 30a). It included a pointed suggestion that

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Continental rather than any other applicant, should be awarded the authority (Appendix, 30a).

In order to maintain control of further proceedings the court directed the Board not to reopen the record for the purpose of taking additional evidence without first petitioning the court to modify its mandate. If such a petition should be filed, the court specified that the Board should set forth "with particularity the matters involved and their relationship to the desirability and feasibility of implementing competition." (Appendix p. 30a)

As to selection of carrier for the competitive authority, the court directed the Board to review the existing record and render a supplemental order either adopting the ALJ's determination that Continental should be selected "or setting forth its separate reasons for accepting or rejecting the ALJ's selection." (Appendix, 31a)

Acceptance of these instructions obviously would preclude any further hearing by the Board, even on new applications, without prior court approval. The reservation of the right to approve must contemplate the existence of the right to deny approval. We suggest that this is the very result intended by the Court.

Continental suggests that this procedural control reserved by the Court is justified by the time which has elapsed since the first phase of this case was first set down. (Br. p. 15) It supports its contention by citing *Ford Motor Company* v. *N.L.R.B.*, 305 U.S. 364, 374 (1939) and *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 655 (1954) as cases in point. A review of these two cases shows that neither of them stands for the principle for which it is cited.

The Board has twice decided within the past 8½ years that competitive service is not required in the San Diego-Denver market. In our view the substantial evidence of record supports those decisions, and the Board's findings are legally sufficient. Therefore, public policy provides a strong impetus to affirm the C.A.B.'s decision and avoid putting Western and other parties through more administrative procedures. The Board could better devote its time and energies to cases of higher priority.

On the other hand, if there are legal infirmities in the Board's decision, there is no basis in the record upon which the lower court or the Board can decide that competition is required under today's circumstances, or which carrier should be selected to provide that competition. It is particularly inappropriate for the lower court to attempt to force its decision on the merits on a Board which now has only two members who participated in the earlier decisions in this case.[1]

D. The Lower Court's Misinterpretation of the Federal Aviation Act

In answer to Western's argument that the lower court misinterpreted the Act in giving preeminence to "competition" as a policy guideline, Continental contends that the court's interpretation is the same as that consistently applied by the Board over its 38 year history. As we pointed out in our Petition (pp. 11-19) this simply is not true. In applying the "[c]ompetition to the extent necessary" policy guideline, which appears in Section 102(d) of the Act, the Board has always considered that it has the discretion to weigh competition

[1] Only Members Minetti and Timm remain, and Member Timm has resigned effective upon his replacement.

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against the other public interest factors in Section 102. It has never deemed competition mandatory, especially when considered in relation to a particular route or service [2] and it has always considered general economic conditions existing at any given time as a moderating factor in competitive route cases.

In other words, the Act vests discretion in the Board to determine when and to what extent competition is necessary in the light of the other policy guidelines. The legislative history of the Act makes this clear (Petition pp. 8-11).

In fact, just 12 days after this case was argued in the court below, and five months before it was decided, the D.C. Circuit decided another C.A.B. case involving an interpretation of the very same policy statement which the Court in this case interpreted as affording preeminence to "competition".

In *United States* v. *C.A.B.*, 511 F.2d 1315 (1975) Judge Wilkie wrote for the court:

> "... it should be noted that competition is merely one of six or more factors to be considered by the Board in determining the public interest [footnote omitted]. Conceivably, in any given case, a less anticompetitive means of achieving the same result would be possible, but it might be uneconomical, less safe, or discourage development of an air transportation system properly adopted to America's future needs (to name three considerations set out in Section 102). In that event, the statute would appear to contemplate that the factor of competition could be outweighed by one or more of the other factors.
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[2] American Export, 2 C.A.B. 16, 31 (1940).

> "Underlying this whole discussion is the fact that the entire regulatory scheme set up by the Federal Aviation Act is severely anticompetitive.
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> * * *
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> "The Department of Justice may well be dissatisfied with the balance drawn by Congress between competition and other aspects of the public interest. However, the remedy is not to seek judicial reinterpretation of statutory language that permits the Board, in an appropriate case, to override antitrust considerations, but to seek from Congress amendment of the Board's statutory charter." (511 F.2d at 1322-23)

Judge Leventhal was a member of the panel in that case and did not file a separate opinion.

We submit that Judge Wilkie's opinion properly interprets Section 102, and puts competition in its proper place among other policy guidelines. But, in any event, it is clear that the interpretation given the statutory provision in this case is directly opposed to that made in *U.S.* v. *C.A.B.* This alone points up the need for Supreme Court guidance.

Respectfully submitted,

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